

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

FILED

June 23, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

**CASSANDRA F. ROMANS AND
WAYNE COUNTY BANK,**

Plaintiffs-Appellees,

Vs.

Wayne Chancery No. 9282
C.A. No. 01A01-9806-CV-00274

JIMMY L. TATUM,

Defendant-Appellant.

FROM THE WAYNE COUNTY CHANCERY COURT
THE HONORABLE WILLIAM B. CAIN, JUDGE

David D. Peluso of Hohenwald
For Appellant

George G. Gray of Waynesboro
For Appellees

AFFIRMED AND REMANDED

Opinion filed:

**W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.**

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE

Defendant-Appellant, Jimmy L. Tatum, appeals the judgment of the trial court setting aside a tax sale of real property because of the lack of actual notice to Plaintiffs-Appellees, Cassandra F. Romans and Wayne County Bank.

On March 25, 1985, Cassandra Romans and her husband, Charles Romans, residents of Lindale, Texas, purchased a fifty acre tract of land in Wayne County, Tennessee for \$45,000.00. The Romans financed a portion of the price by borrowing \$30,000.00 from Wayne County Bank (Bank). To secure the indebtedness, a trust deed in favor of the Bank was recorded in the Wayne County Register's Office. In October 1987, the Romans borrowed additional money from the Bank, and a new trust deed to secure the additional indebtedness was filed in the Wayne County Register's Office. Tax notices on the property were sent to the Romans' Texas address.

In 1988, the Romans moved to Bartlett, Tennessee. Mr. Romans subsequently notified the Wayne County Tax Assessor's Office of the new address. In the latter part of 1989, the Romans moved to Waynesboro, Tennessee, however, they did not reside on the subject property. On May 18, 1990, the Romans sold approximately ten acres of the subject property to Donald and Lisa Powers. Around this same time, Mr. Romans became seriously ill and entered a hospital in Nashville, Tennessee. Because of this, the Romans subsequently moved from Waynesboro to Goodlettsville, Tennessee. On September 18, 1990, Mr. Romans died of bronchial asthma.

After the death of her husband, Ms. Romans continued to reside at the Goodlettsville address. Ms. Romans also continued to make monthly payments on the indebtedness at the Bank.

In late February 1994, Ms. Romans received a notice at the Goodlettsville address that the 1993 taxes in the amount of \$66.18 were due on the subject property. Ms. Romans submitted a check for that amount to the Wayne County Trustee's Office on March 3, 1994. On March 8, 1994, the check was returned to Ms. Romans by the Trustee's Office because an additional ninety-nine cents was due because of accrued interest. Ms. Romans was advised in the letter accompanying the returned check to either submit a new check for the entire amount or write an additional check for the additional amount due. Subsequently, Ms. Romans submitted a new check for the total amount due.

On March 30, 1994, Ms. Romans received a letter from the Trustee's Office stating that the subject property had been sold at a tax sale on December 12, 1992 because of delinquent taxes. Ms. Romans asserts that this letter was the first time she was aware of any problem with the taxes on the subject property. Upon receipt of the letter, Ms. Romans contacted the vice-

president of the Bank to tell him of the situation. The vice-president allegedly had no personal knowledge of the matter and “was shocked to hear about it.”

What had transpired was that a lawsuit was filed against the Romans in 1992 by the tax attorney for Wayne County because the 1990 taxes on the subject property were delinquent in the amount of \$185.00. Notice and summons were mailed by certified mail to the Romans’ Bartlett address on May 19, 1992 and were subsequently returned marked “Forwarding Order Expired.” The Bartlett address was the most recent address on file for the Romans in the Trustee’s Office. On October 6, 1992, another certified letter was sent to the Romans at the Bartlett address informing them that the property would be sold at a tax sale if the delinquent taxes were not paid. This letter was subsequently returned marked “Return to sender. Forwarding address expired.” After this letter was returned, the Clerk and Master of Wayne County published a notice of the impending tax sale in a local newspaper. On December 12, 1992, the subject property was sold to Mr. Tatum for \$216.33.

On July 14, 1994, Ms. Romans and the Bank filed the instant suit against Tatum and the Powers to quiet title to the subject property.¹ Ms. Romans and the Bank sought to have the tax sale set aside because of the lack of sufficient notice of the delinquent tax lawsuit and the tax sale. Tatum filed a motion to dismiss which was later denied. Tatum then filed an answer to the complaint in which he also moved for summary judgment.

On September 29, 1995, Ms. Romans and the Bank filed an amended complaint alleging that T.C.A. § 67-5-2502 was unconstitutional in that it violated their due process rights. The amended complaint added the Attorney General for the State of Tennessee as a party defendant to the suit. On December 15, 1995, the Attorney General filed a motion seeking to be dismissed from the lawsuit. The Attorney General declined to defend the constitutionality of T.C.A. § 67-5-2502(c) stating that he believed the waiver-of-notice provision violated the due process clause of the federal constitution. Shortly thereafter, Ms. Romans and the Bank filed a motion to dismiss the Attorney General from the lawsuit and a motion for summary judgment alleging that they were entitled to a judgment since there was no dispute as to the constitutionality of T.C.A.

¹ On December 22, 1994, an agreed order was entered granting the Powers a voluntary dismissal from the lawsuit. On February 3, 1995, an order was entered dismissing the Powers as defendants in the lawsuit.

§ 67-5-2502.

On June 4, 1996, an order was entered by the trial court finding that T.C.A. § 67-5-2502(c) was unconstitutional as it related to the claims of the Bank. The order also dismissed the Attorney General from the lawsuit and denied Tatum's motion for summary judgment. Tatum then filed a motion for interlocutory appeal with regard to the trial court's finding that T.C.A. § 67-5-2502(c) was unconstitutional, and the motion was subsequently denied.

On April 2, 1998, a non-jury trial was held, and, on April 30, 1998, a judgment was entered setting aside the tax sale. The trial court held that the due process rights of Ms. Romans and the Bank were violated because they were not provided actual notice of the tax sale despite the fact that their addresses were reasonably ascertainable. Tatum has appealed, and the only issue for review is whether the trial court erred in setting aside the tax sale of the subject property.

Since this case was tried by the trial court sitting without a jury, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. T.R.A.P. 13(d).

Tatum asserts that Ms. Romans' interest in the subject property is a possessory interest since she is the owner of the property, thus making T.C.A. § 67-5-2502(a) applicable to her. As such, he submits that the burden was on Ms. Romans to notify the tax assessor of her current address and that notice by publication was all that was required since she failed to notify the tax assessor of such. With regard to the Bank, Tatum contends that the Bank, as a non-possessory interest holder, waived its right to notice due to its failure to comply with T.C.A. § 67-5-2502(c) by failing to register with the assessor of property.

On the other hand, Ms. Romans contends that she did not receive proper notice of the tax lawsuit which she submits is governed by T.C.A. § 67-5-2415 and T.C.A. § 21-1-203. While her address may have been unknown, Ms. Romans argues that her current address was easily ascertainable in that a cursory title search would have revealed the trust deed in favor of the Bank and that the Bank was aware of her correct address at all times due to its receipt of her monthly mortgage payments. Furthermore, Ms. Romans submits that there is absolutely no evidence that she had actual knowledge of the lawsuit. Since constructive notice was not proper given the

circumstances, the tax sale was invalid. The Bank asserts that while it failed to comply with T.C.A. § 67-5-2502(c), its address was readily ascertainable, it had no actual notice of the tax sale, and since no steps were taken to notify it of the impending tax sale, the tax sale was invalid.

Assessed taxes are a lien on the subject property from January 1 of the year for which assessed. T.C.A. § 67-5-2101 (1998). Actions for collection of delinquent taxes and enforcement of the tax lien may be filed in either the circuit or chancery court in the county where the taxes are due. T.C.A. § 67-5-2405 (1998). Notice to the taxpayer of the lawsuit is governed by T.C.A. § 67-5-2415 (1998). Where constructive service of the lawsuit is required, T.C.A. § 67-5-2415(d) provides that “[c]onstructive service of process shall be made as now provided by law.”

In order to collect delinquent taxes on real property, “[t]he court shall order a sale of the land for cash, subject to the equity of redemption.” T.C.A. § 67-5-2501(a)(1) (1998). When a tax sale is ordered, “[n]otice to parties or others in delinquent tax suits and sales shall be governed by the Tennessee Rules of Civil Procedure, and may be forwarded to the address of an owner of the property which is on record in the office of the assessor of property.” T.C.A. § 67-5-2502(a)(3) (1998).

Prior to 1996 and applicable to the case before us, in order for anyone with an interest in the property to assure himself of notice, the following procedures were prescribed:

(b) It shall be the responsibility of the property owner to register the property owner’s name and address with the assessor of property of the county in which the land lies.

(c)(1) Any person claiming an interest in taxable real property who is not in possession of that property shall be deemed to have waived any right to notice provided by § 67-5-2415 or this section unless such person shall file a statement declaring such interest with the assessor of property.

T.C.A. § 67-5-2502(b)-(c)(1) (Supp. 1994).²

² In 1996, T.C.A. § 67-5-2502(c) was completely rewritten and now provides as follows:

(c) The delinquent tax attorney shall make a reasonable search of the public records in the offices of the assessor of property, trustee, local office where wills are recorded, and register of deeds and give notice to persons identified by the search as having an interest in the property to be sold. The court shall set a reasonable fee for this service.

T.C.A. § 67-5-2502(c) (1998).

Neither the Bank nor Ms. Romans filed any such declaration of interest. The tax notices, including the notice of the tax sale, and the notice of the lawsuit were mailed to Ms. Romans' Bartlett address which were subsequently returned since the forwarding order had expired. Notice of the tax sale was published in a local newspaper, but neither the Bank nor Ms. Romans saw the publication. Both the Bank and Ms. Romans assert that neither received notice of nor had actual knowledge of the tax lawsuit or the tax sale.

Notwithstanding the language of T.C.A. § 67-5-2502, where constructive service or notice is resorted to, as in the case *sub judice*, constitutional due process requirements must be satisfied. *Freeman v. City of Kingsport*, 926 S.W.2d 247, 249 (Tenn. App. 1996). These due process considerations “require that an interested party receive actual notice of a proceeding *in rem* which affects their interest in property if the interested party’s name and address are reasonably ascertainable.” *Morrow v. Bobbitt*, 943 S.W.2d 384, 391 (Tenn. App. 1996) (discussing *Freeman*, 926 S.W.2d 247).³ Moreover, “[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.” *Sunburst Bank v. Patterson*, 971 S.W.2d 1, 5 (Tenn. App. 1997) (quoting *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799-800, 103 S. Ct. 2706, 2712, 77 L. Ed. 2d 180 (1983)). *See also Warmath v. Payne*, No. 02A01-9803-CH-00084, 1999 WL 145004 (Tenn. App. March 18, 1999) (finding that constructive notice for a tax sale was insufficient and actual notice was required since the property owners’ names and address were reasonably ascertainable).

From a review of the record, we find that both Ms. Romans’ and the Bank’s names and addresses were reasonably ascertainable. Ms. Romans’ name was on both the recorded warranty deed and trust deed, and the Bank’s interest is shown in the trust deed. The Bank could have supplied Ms. Romans’ current address at all times. Moreover, the Bank’s address was reasonably ascertainable considering the Bank is located in the same county as the subject

³ The *Freeman* Court concluded that the same due process standard is essentially codified at T.C.A. § 21-1-203 which dispenses with the requirements of actual notice and allows constructive notice to a party only after there has been a diligent inquiry to locate and notify that party. *Freeman*, 926 S.W.2d at 250.

property.

“When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee’s last known available address, or by personal service. But unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane*.”

Sunburst Bank, 971 S.W.2d at 5 (quoting *Mennonite*, 462 U.S. at 798, 103 S. Ct. at 2711).

Thus, given that both of the interested parties’ names and addresses were reasonably ascertainable, notice by publication did not satisfy constitutional due process requirements. Because actual notice was not provided to either party, the tax sale violated both Ms. Romans’ and the Bank’s due process rights, and the trial court properly invalidated the sale of the subject property.

Accordingly, the judgment of the trial court is affirmed, and the case is remanded to the trial court for such further proceedings as may be necessary. Costs of appeal are assessed against the appellant.

**W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.**

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE